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No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

BLUE JEANS EQUITIES WEST
A Joint Venture
Petitioner,

vs.

CITY & COUNTY OF SAN FRANCISCO
A Municipal Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

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July 14, 1992

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QUESTIONS PRESENTED

1. Whether this Court's opinion in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), holding that the "just compensation" clause of the Fifth Amendment requires that an exaction imposed as a condition of project approval must substantially advance legitimate public interests directly related to the project approved, applies to all exactions—or is the holding in *Nollan* limited solely to exactions of interests in land, as the California Court of Appeal held.

2. Whether this Court's decision in *Nollan, supra*, applies only to "possessory takings" cases and does not apply to "regulatory takings" cases, as the California Court of Appeal held.

3. Whether the action of the City and County of San Francisco ("City") constitutes a "taking" under the Fifth and Fourteenth Amendments of the United States Constitution when City has sought to impose a regulatory fee of $3,100,000 on a project approved two years prior to the enactment of the regulatory fee and where the fee seeks to alleviate impacts that were not found to have been caused or created by the project in question at the time it was approved.

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the Court of Appeal of the State of California.

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CITY & COUNTY OF SAN FRANCISCO
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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

Petitioner, BLUE JEANS EQUITIES WEST, a joint venture ("BJEW"), petitions for a Writ of Certiorari to review the order of the California Court of Appeal, First Appellate District, Division Three. The California Supreme Court denied BJEW's request for review and there are no other avenues for review of the decision and judgment within the California court system.

NOTE: In all quoted material, footnotes are omitted and emphasis is ours unless otherwise stated. We support factual statements by citation to the record before the California Court of Appeal. We use "RT" to signify citations to the Reporter's Transcript and "AA" to signify citations to Appellant's Appendix (containing documents filed with the Court Clerk) by document and page reference where appropriate. We refer to trial exhibits by exhibit number.

OPINION BELOW

The opinion of the Court of Appeals is reported at 3 Cal.App.4th 164, 4 Cal. Rptr. 2d 114 (January 31, 1992). A copy of the opinion is attached as Appendix A. The order of the California Supreme Court denying BJEW's Petition for Review was filed on April 29, 1992. A copy of the Supreme Court's Order is included as Appendix B.

JURISDICTION

The California Supreme Court's denial of BJEW's Petition for Review constitutes the final decision of California's highest court in this matter. This Court has jurisdiction under 28 USC Section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment, United States Constitution:

> . . . nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, United States Constitution:

> SECTION 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. *Procedural Posture: Ripeness.*

This case concerns the validity of a permit condition imposed by the City and County of San Francisco ("City") when it gave its final approval to a development project, a high-rise office and retail building. City finally interpreted the permit condition when it demanded payment of a regulatory fee that it claimed was owed under that permit condition. BJEW paid the fee under protest and

commenced this action to contest it. It seeks this writ to reverse an adverse ruling after a bench trial on the merits, affirmed on appeal by the California Court of Appeal, and after review was denied by the California Supreme Court.[1]

B. *Summary.*

In *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), this Court held that a condition imposed in connection with the approval of a project violates the "just compensation" requirement of the Fifth Amendment of the United States Constitution unless it alleviates an impact caused by the project approved. *In this case, the California courts have held that the Nollan doctrine does not apply to the facts recited below*—that City can require BJEW to pay a regulatory fee without showing that the imposition substantially advances a legitimate public interest that the project impacts. The California courts have concluded that *Nollan* does not apply because it is a "possessory takings" case, and the constitutional requirement that *Nollan* declares does not apply to the *regulatory* imposition of fees.

BJEW is the owner of an office and retail complex known as "Levi's Plaza" located at the foot of Telegraph Hill in the Northeast Waterfront section of San Francisco, California.[2] City granted final approval for Levi's Plaza on January 4, 1979.[3]

The approval resolution ("Resolution") contained many conditions. The condition at issue here is:

> 5(c) The owner of the project shall make a good faith effort to participate in future funding mechanisms to assure ade-

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[1] City has made "a final and authoritative determination" of the terms and conditions upon which it would allow development to proceed. BJEW's claims are ripe for adjudication under the doctrine of *MacDonald, Sommer & Frates v. County of Yolo,* 477 U.S. 340, 348 (1986).

[2] See Map, Appendix C attached.

[3] Ex. 2.

quate transit service *to the area of the City in which the project is located.*[4]

This case arises out of City's effort to collect $3,100,000 as a fee to raise money for capital transit improvements pursuant to an ordinance enacted two years after it approved Levi's Plaza.[5] By that time, Levi's Plaza was nearly complete. Unless Paragraph 5(c) requires BJEW to pay, City cannot constitutionally collect the fee.[6]

City had no transit funding mechanism in place or in contemplation while it was considering and approving Levi's Plaza.

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[4] Ex. 2, Para. 5(c). Approval resolutions are the "law of the City." The rules of statutory construction apply. See *Terminal Plaza Corp. v. City and County of San Francisco*, 186 Cal.App.3d 814, 825, n. 7, 230 Cal. Rptr. 875, 880 n. 7 (1986).

[5] Ordinance No. 224-81, San Francisco Admin. Code 38.1, *et seq.*; Ex. 5.

[6] *Russ Building Partnership v. City & County of San Francisco*, 44 Cal.3d 839, 244 Cal. Rptr. 682, 750 P.2d 324 (1988) determined that the fee here in question was a development or regulatory fee, and not a tax. If the fee had been determined to be a "tax," it would have violated California Proposition 13 limits because it was enacted without the required two-thirds vote. Cal. Constitution Article 13A. As a development fee, it cannot apply to a project protected by a "vested right," *i.e.*, the right to proceed free of regulation adopted after the vested right accrued. *Russ Building Partnership*, 44 Cal.3d, at 845-46; *Avco Community Developers v. South Coast Regional Commission*, 17 Cal.3d 785, 132 Cal. Rptr. 386, 553 P.2d 546 (1976), *appeal dism'd*, 429 U.S. 1083 (1977). State law controls the definition and extent of "vested rights" as an incident of the concept of "property." *See, e.g., Lakeview Development Corporation v. South Lake Tahoe*, 915 F.2d 1290 (9th Cir. 1990). As this Court has stated, "[W]e are mindful of the basic axiom that '"[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."'" *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984), quoting from *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980), quoting in turn from *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

Indeed, Levi's Plaza was the first commercial project approved by City where City's planners recognized a possible "linkage" between new development and impact upon transit service.[7]

When it approved Levi's Plaza, City did not have enough evidence of the project's expected impact on transit to impose a mandatory requirement.[8] Its ideas were "general and amorphous . . ."[9] The only funding mechanism tentatively discussed during consideration of Levi's Plaza was an assessment district, a device that would impose the cost of additional transit service upon all developed property rather than simply upon new development.[10]

More than two years later, City enacted the Transit Impact Development Fee Ordinance ("TIDFO") imposing a $5.00 per square foot fee on new construction in the "Downtown Area" of the City, broadly defined to include the Northeast Waterfront area where Levi's Plaza is located.[11] Claiming that the TIDFO constitutes the funding mechanism referred to in Paragraph 5(c) of the Resolution, City demanded that BJEW pay $3,100,000. BJEW paid the money into escrow under protest and commenced

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[7] See note 15, *infra*.

[8] See note 16, *infra*.

[9] Testimony of Assistant Planning Director, RT 172:2-3. At trial, the City Attorney characterized the situation as follows:

> "As of January 4, 1979 [when Levi's Plaza was approved] . . . no [City] employee knew what kind of funding mechanism, *if any*, would be imposed on BJEW to mitigate the transit impact generated by the Levi's project." RT 49:18-23.

This statement purports to paraphrase Paragraph 18 contained in a stipulation of facts in the Clerk's Record at AA 29. It is an admission binding on City. See *Oscanyan v. Winchester Repeating Arms, Co.*, 103 U.S. 261 (1881).

[10] RT 75:8-23; 76:5-9; 101:17-102:12; 105:28-107:15; AA 28-29, ¶¶ 16-17.

[11] The "Downtown Area" as defined by the TIDFO includes an attenuated geographical appendage, apparently designed to include Levi's Plaza notwithstanding its remoteness from the traditional downtown area. See Appendix C.

this action to contest it. The amount in issue now exceeds $4,000,000, with interest.

When it was considering BJEW's application for approval of Levi's Plaza, City prepared an environmental impact report. That report, and other material available at the time, showed that Levi's Plaza *might* impose a burden on transit service. Designed to house the corporate offices of Levi Strauss & Co., the project would relocate Levi's employees away from the traditional downtown area to the Northeast Waterfront—an area that was then underserved by transit.[12]

The transit deficit in the Northeast Waterfront, however, was not then related to office use; nor was it seen as part of a larger problem besetting the urban core. In its very next action recognizing possible linkage between project construction and transit impact, City imposed a condition on approval of a *residential project* in language identical to that used with respect to Levi's Plaza.[13] Despite the identical language in its permit and its location close to Levi's Plaza, the "Downtown Area" as defined by the TIDFO excludes this project.

None of the planning documents or data considered by City while it was processing or approving the permit for Levi's Plaza quantified its expected impact on transit or defined an area of impact broader than the Northeast Waterfront. Members of the City Staff thought there was an impact—but they didn't know what it was and didn't know that they would ever know with sufficient certainty to impose a mandatory requirement.[14]

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[12] Ex. 1 (Levi's Plaza Final Environmental Impact Report Excerpts at 7); RT 25:14-19; 27:21-28:27; 29:9-15; 113:5-13. At the time the project was approved, Broadway was generally regarded as the northern boundary of the downtown area. RT 123:16:24. Levi's Plaza is considerably north of Broadway. See Appendix C.

[13] Approval Resolution For Wharf Park Residential Project, Exhibit 19, Para. 6, adopted June, 1979. See Appendix C for location.

[14] See note 9, *supra*. Rai Okomoto, City's then Planning Director, testified:

Question (by Mr. Ellman, counsel for BJEW):

All of these uncertainties were compounded by City's long-standing "transit-first" policy—a policy that had been in place and implemented in several ways long before Levi's Plaza was proposed. The "transit-first" policy discourages the use of private automobiles by commuters in the hopes of compelling urban employees to utilize public transportation.[15] For example, City prohibits construction of parking garages in its office commercial areas, does not allow new buildings to provide parking to serve the needs of commuters, and mandates the imposition of parking fees that discriminate against all-day parkers. *These policies are expressly intended to increase the burden on transit wholly apart from new construction.*[16]

Enacted more than two years after City considered and approved Levi's Plaza, the TIDFO effectively redefined the impact on transit the project supposedly caused, redrew the boundaries of the area impacted—and crystallized a vague concept into a precise and formidable exaction. Instead of focusing on the Northeast Waterfront, it defined impacts in terms of an expansive Downtown Area. Levi's Plaza falls within the newly defined Downtown Area only through creation of an improbable extrusion

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> The first phrase of this [paragraph 5(c) of Exhibit 2, the exaction condition] refers to 'a good faith effort'.... What is the understanding that you had in the Planning Department of the meaning of that term in an approval resolution?
>
> Answer:
>
> I think again at that time this relationship between development and transportation was just beginning to be understood as a significant phenomenon, if you will, in the course of planning, and I think that we felt at the time, and I believe the Commission agreed, which is undoubtedly why they adopted this language, ***that we hadn't provided enough evidence that could lead us to make it a mandatory requirement that developers assume some burden of the impact on transit.*** The phrase "good faith effort", was in effect then a kind of compromise.... RT 104:7-105:7.

[15] See, *e.g.*, RT 168:22-169:8; San Francisco Master Plan Transportation Element pp. I.4.9, 11, 13; II.1.38, 40.

[16] RT 179:19-28. [Admission by Assistant Director of Planning.]

from the traditional northern boundary of the City's urban core.[17] Instead of dealing with transit impact generally, the TIDFO focuses solely on the impact caused by "cumulative" office development.[18] Rather than creating an assessment on all benefited property—as would be the case with an assessment district—it lays the entire burden on new construction. And from a "general and amorphous"[19] idea, insufficiently specific to create mandatory obligation and contemplating a "good faith effort to participate . . .", it creates a specific, mandatory and substantial fee.[20]

City did all this with a *legislative enactment*, making its determination apply to all office buildings by virtue of their proposed use and location. The TIDFO provides no mechanism for defining the impact or the mitigation by reference to the specific attributes of specific projects. The TIDFO did not purport to address Levi's Plaza or the findings that had been made in the environmental impact report for that project. It simply threw the project into the basket with the others, relying on a provision that made the fee apply to all projects that had a "future funding mechanisms . . ." provision in their approval resolutions.

The California courts have now held that *Nollan* does not apply to the foregoing facts. Believing that result to be wrong and a violation of its constitutional right to just compensation, BJEW petitions this Court for certiorari.

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[17] Appendix C.

[18] TIDFO, Ex. 5. The purpose of the TIDFO is summarized in *Russ Building Partnership v. City and County of San Francisco*, 44 Cal.3d 839, 844-45, 244 Cal. Rptr. 683-84, 750 P.2d 324, 325-26 (1988). *Russ Building* held that the TIDFO could be applied to two projects approved later than Levi's Plaza but prior to enactment of the TIDFO, based on language in approval resolutions that differs substantially from that contained in the approval resolution for Levi's Plaza. The Court in *Russ Building* refused (apparently on procedural grounds) to apply *Nollan* to the facts before it. See 44 Cal.3d at 845, n.6.

[19] See note 9, *supra*.

[20] See note 15, *supra*.

ARGUMENT

A. The California Court of Appeal Wrongly Concluded That *Nollan* Applies Only To "Possessory Takings" and Not "Regulatory Takings" Cases.

The California Court of Appeal states its conclusion in the first paragraph of its opinion:

> In this action we consider whether the heightened scrutiny test alluded to in *Nollan* . . . should be applied to the [*TIDFO*] . . . . *We conclude the Nollan analysis is applicable only to "possessory takings," rather than "regulatory takings," and does not apply to the TIDF.*

3 Cal.App.4th at 166, 4 Cal. Rptr. 2d at 115.

As a preliminary matter, we submit that if a recent, landmark interpretation by this Court of the Fifth Amendment of the United States Constitution is to be limited, *it is for this Court,* not the California Court of Appeal, to make that determination. As it happens, this Court explicitly rejected the Court of Appeal's limiting postulate in an opinion filed 60 days later.[21]

Yee v. Escondido, 60 U.S.L.W. 4301 (April 1, 1992) defines the difference between "possessory takings" and "regulatory takings" as follows:

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[21] The error in the Court of Appeal's conclusion is obvious on the face of the *Nollan* opinion. For example:

> In *Loretto* (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)), we observed that where governmental action results in "[a] permanent physical occupation of the property, by the government itself or by others, see 458 U.S., at 432-433, n.9, "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner," *id.*, at 434-435. *Nollan*, 483 U.S., at 831-32.

The Court concluded that the "permanent physical occupation" analysis did *not* apply to the facts before it. If *Nollan* was truly a possessory takings case, then this Court could have cited *Loretto, supra,* and *Kaiser Aetna v. United States,* 444 U.S. 164 (1979) and left the matter at that.

> . . . The government effects a physical taking only where it *requires* [emphasis in original] the landowner to submit to the physical occupation of his land. "This element of required acquiescence is at the heart of the concept of occupation." *FCC v. Florida Corp.*, 480 U.S. 245, 252 (1987). Thus whether the government floods a landowner's property, *Pumpelly v. Green Bay Co.*, 13 Wall. 166 (1872), or does no more than require the landowner to suffer the installation of a cable (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)), the Takings Clause requires compensation if the government authorizes a compelled physical invasion of property.

Such compulsion is lacking, however (and the case becomes a "regulatory takings" case), if the imposition occurs as a result of voluntary action on the part of the property owner.[22]

The Court applied "regulatory takings" analysis to *Yee* because the condition of which Yee complained was imposed upon the conduct of a business that he could discontinue,[23] as the plaintiffs in *Nollan* and in *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82-84 (1980), could have avoided the impositions of which they complained by electing not to engage in the activities that triggered them. The Nollans could have avoided dedicating the

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[22] Cf. *Nollan*, 483 U.S., at 834.

[23] *Yee*, 60 U.S.L.W., at 4303:

> But the Escondido rent control ordinance, even when considered in conjunction with the California Mobilehome Residency Law, authorizes no such thing [requirement of physical invasion]. Petitioners *voluntarily* rented their land to mobile home owners. At least on the face of the regulatory scheme, neither the City nor the State compels petitioners, once they have rented their property to tenants, to continue doing so. To the contrary, the Mobilehome Residency Law provides that a park owner who wishes to change the use of his land may evict his tenants . . . (Citation). *Put bluntly, no government has required any physical invasion of petitioners' property. Petitioners' tenants were invited by petitioners, not forced upon them by the government.* (Citation).

offensive easement by electing not to take the benefits of the permit restricted by the easement condition. PruneYard could have excluded unwanted political solicitors by ceasing to engage in the commercial activity found to have invited them.

Here, BJEW complains of a condition attached to a permit. The condition *regulates* the exercise of a *right*, i.e., the right to use its property for a specific purpose.[24] As in *Yee*, *Nollan*, *PruneYard* and other "regulatory takings" cases, BJEW could have avoided the imposition by electing not to proceed.

In short, the conclusion of the California Court of Appeal on the pivotal issue in this case is inescapably wrong, flying in the face of rationale often repeated in opinions of this Court on issues of taking that were restated with emphatic clarity in *Yee*.[25] *Nollan* is a regulatory takings case.

Setting aside the clear error in its use of terminology, it is possible that the Court of Appeal intended to limit *Nollan* to those cases where the government exacts an interest in the regulated land rather than payment of a fee or the imposition of another form of burden on the right to use property. Such a limitation is equally wrong. We deal with it in the next sections of Argument.

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[24] . . . the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a "governmental benefit."

Nollan, 483 U.S., at 834, n.2.

[25] The Court of Appeal relied on *Commercial Builders v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991) *cert. denied*, 60 U.S.L.W. 3782 (1992) which reached a similar result on similar reasoning. *Commercial Builders* deals with a *facial attack* on the constitutionality of an ordinance requiring developers of commercial buildings to contribute funds for low cost housing. In a facial attack, the plaintiff must establish that there is no state of facts to which the ordinance can be constitutionally applied. *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987). This is not a facial attack case. This case went to trial and must be decided on its facts.

B. The Fifth Amendment Protects Property Owners From Excessively Burdensome Restriction On The Use Of Property: It Requires Compensation If The Burden Exceeds That Which The Individual Should Be Required To Bear.

1. Takings Are Determined By The Impact On The Property Owner. The Nature Of The Interest Taken Does Not Control.

In *Armstrong v. United States*, 364 U.S. 40, 49 (1960), the Court stated:

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.[26]

In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1004-5 (1984), the Court quoted *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945), as follows:

> . . . [C]ourts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.

A regulation may advance a legitimate State interest and still constitute a taking. Police power regulations that fail to advance a legitimate public purpose are void for that reason alone. Thus, the fact that the TIDFO may have a valid purpose—funding for enhanced public transit—does not end the inquiry. It answers only the first portion of the threshold question, nothing more. Once the government establishes the facial legitimacy of its action, the focus shifts to the opposite pan of the balance, i.e., the impact of

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[26] See also *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987).

the regulation on a particular property owner based on the facts of that specific case.[27]

Nollan deals with the problem created by a particular class of regulatory takings cases, those in which the government imposes conditions upon the issuance of a permit.[28] The Court held that a regulatory condition goes "too far"[29] in imposing a burden upon a property owner unless the condition directly alleviates an impact the proposed project would otherwise cause and that would have justified a refusal to approve the project without the mitigating condition. Unless so constrained—in the absence of such a nexus — the condition does not substantially advance a legitimate state interest and it exceeds the constitionally permissible burden government can impose upon a property owner without payment of just compensation.

The issue posed by this case is whether or not that doctrine applies *only* to conditions that require a property owner directly to give away an interest in the permitted property itself. In so holding, the Court of Appeal necessarily concluded that *this*

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[27] This Court has repeatedly stated that takings cases must be decided on their particular facts. See, *e.g., Keystone Bituminous Coal Association v. DeBenedictis,* 480 U.S. 470, 492-93, 495 (1987); *Connolly v. Pension Benefit Guaranty Corporation,* 475 U.S. 211, 224 (1986); *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980); *Penn Central Transportation Company v. New York City,* 438 U.S. 104, 138 (1978).

[28] Given, then, that requiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment, the question becomes whether requiring it to be conveyed as a condition for issuing a land-use permit alters the outcome . . . . Our cases have not elaborated on the standards for determining what constitutes a "legitimate state interest" or what type of connection between the regulation and the state interest satisfies the requirement that the former "substantially advance" the latter.

Nollan, 483 U.S., at 834.

[29] *Pennsylvania Coal v. Mahon,* 260 U.S. 393, 413, 415 (1922).

Court would have found no infirmity in a condition requiring the Nollans to pay a fee to acquire the very easement they could not be required to dedicate. The conclusion is illogical, unsupported by any authority and plainly contrary to this Court's conclusion that " . . . the Fifth Amendment's Property clause . . . [is] more than a pleading requirement, and compliance with it . . . [is] more than an exercise in cleverness and imagination." *Nollan*, 483 U.S., at 841.

2. The Fifth Amendment's Just Compensation Requirement Applies Equally To Cash Exactions As It Does To Land Dedication Requirements.

It is the burden imposed upon the exercise of property rights that must be tested by constitutional formulations stated by this Court. The *nature* of the exaction does not determine the *extent* of the burden, nor should it be used as the yardstick to determine when governmental action has gone "too far" and traversed the takings threshold.

The concept of property protected by the Fifth Amendment's just compensation requirement is not a sterile or rigid concept, restricted to interests in land. To the contrary, this Court has recognized that "property" encompasses a vast range of fundamental rights protected by the Constitution although not defined by it.[30]

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[30] "[W]e are mindful of the basic axiom that "'[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984) (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980), quoting in turn from *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)).

Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972) states:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

This oft-quoted statement echoes teachings of the Framers as well as their antecedents. For example, James Madison wrote of "property:"

> This term in its particular application means: "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual."
>
> In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and *which leaves to every one else the like advantage*. (Emphasis in original).
>
> In the former sense, a man's land, or merchandise, or money is called his property.
>
> In the latter sense, a man has property in his opinions and the free communication of them.
>
> He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them.
>
> He has property very dear to him in the safety and liberty of his person.
>
> He has an equal property in the free use of his faculties and free choice of the objects on which to employ them.
>
> In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.

> Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties or his possessions.

G. Hunt, VI *The Writings of James Madison* at p.101 (The Knickerbocker Press, 1906), (quoting from *The National Gazette*, March 29, 1792).[31]

The Fifth and Fourteenth Amendments[32] do not differentiate between types or classes of property interest, nor do they suggest that money is entitled to less protection than land.

This Court has consistently used the same verbal formula in its regulatory takings cases without regard to the type of interest being regulated—and allegedly taken. For example, see *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (an excessively burdensome fee); *Andrus v. Allard*, 444 U.S. 51 (1979) (regulation of the sale of bird feathers); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (regulation of intellectual property rights in chemicals registered by the EPA); *Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211 (1986) (regulation of monetary rights under ERISA).

The Court's opinions in these cases provide no support for a distinction in takings analysis based upon the nature of property required to be given up. For example, *Connolly* takes pains to reconcile its opinion with a list of regulatory takings cases that includes *Loretto* and *Kaiser Aetna*. See *Connolly*, 475 U.S., at 224. *Loretto* and *Kaiser Aetna* are both cases where the government took a possessory interest in land. The regulation attacked

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[31] See also, John Locke, TWO TREATISES OF GOVERNMENT (P. Laslett, rev.ed. 1988, Section 124, Sections 201, 202 ("Whenever the Legislators *endeavor to take away and destroy the Property of the People* . . . they put themselves into a state of War with the People who are thereupon absolved from any farther obedience." (Emphasis in original)).

[32] "[N]or shall *private property* be taken for public use, without just compensation."

as a taking in *Connolly* was a provision of ERISA imposing a monetary liability in the operation of pension trust funds.

Connolly also cites *Ruckelshaus* as part of the authoritative line of takings cases that includes *Loretto* and *Kaiser Aetna*. *Ruckelshaus*, an intellectual property regulation case, in turn cites and relies upon land use regulation cases including *PruneYard*, a regulatory takings case—but a case where the regulation required a certain type of physical invasion of real property as a condition to its use for certain purposes. And to complete the circle, *Ruckelshaus* is cited and relied upon by *Nollan* (another regulatory taking, land invasion case) as articulating the controlling "regulatory takings" formula. 483 U.S., at 833 n.2.

The Court of Appeal quoted a portion of the *Nollan* opinion attempting to support its conclusion that the "heightened scrutiny" required by the case applies only to conditions that exact interests in the regulated land. 3 Cal.App.4th, at 169. The entire passage in which that sentence occurs is as follows:

> We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgment of property rights through the police power as a "*substantial* advanc[ing]" of a legitimate state interest. [Emphasis in original]. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.

483 U.S., at 841.

This language, we submit, says nothing more than that dedication requirements (as opposed to cash conditions) should be viewed with greater suspicion *because they are more likely to be illegal*,

not because land gets more constitutional protection than money.[33]

C. As Applied To Levi's Plaza, The TIDF Plainly Fails The Substantial Advancement Test Required By Nollan.

Intense analytical scrutiny is not needed to show that the TIDFO—applied to Levi's Plaza *on the facts of this case*—fails both parts of the *Nollan* substantial advancement test.

Nollan begins with the proposition that if a public purpose justifies the imposition of a regulation prohibiting exercise of a right to develop the subject property, then the property owner can

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[33] The second piece of *Nollan* to which the Court of Appeal might have referred is:

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking. . . . We have repeatedly held that, as to property reserved by its owner for private use, "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"

(Citing *Loretto* and *Kaiser Aetna*). *Nollan*, 483 U.S., at 831. This passage is preliminary to the main argument, stating a premise in response to Justice Brennan's dissent. It does not suggest that exaction of an interest in the regulated real estate or "the right to exclude others" is *essential* to a finding of a taking or to the "substantial advancement" rationale the Court adopted to define the takings threshold. We have long passed the point where it could seriously be argued that no regulation can go "too far" unless it deprives the property owner of a right to exclude others. See, *e.g.*, *Lucas v. South Carolina Coastal Com.*, 60 U.S.L.W. 4842 (June 29, 1992); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *Connolly v. Pension Benefit Guaranty Corp.*, *supra*; *Andrus v. Allard*, *supra*; *Agins v. Tiburon*, 447 U.S. 255 (1980); *Penn Central Transportation Company v. New York City*, 438 U.S. 104 (1978).

raise no constitutional objection to a regulation that directly serves the same end while allowing development to proceed. *A justifiable building ban* provides the starting point. 483 U.S., at 836.

Here, City cites impact upon public transit as its justification. At the time City considered and approved Levi's Plaza, however, it could not define the impact, it had no mitigation (building ban or otherwise) in mind and its planning staff had no idea whether, at what point and in what form it would resolve these issues.[34] On this state of facts, we submit that City could not lawfully have banned construction of Levi's Plaza because of its potentially "general and amorphous" impact on public transit.

Once it is established that " . . . the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit'" [*Nollan*, 483 U.S., at 834, n.2], it should be clear beyond argument that a regulation prohibiting development must have a stronger base than that advanced here. Thus, City's effort to apply the TIDF to Levi's Plaza, *viewed as of the time the project was considered and approved on its specific facts,* fails at the first hurdle of the *Nollan* test.

The question remains whether City cured this defect by the "findings" in the TIDFO. Being unable to find a potential impact on transit sufficient to justify a regulatory ban on the right to construct Levi's Plaza when the project was before it, can City create a justification by legislative findings—adopted to apply generally and without regard to the specific attributes of the project—two years after the fact? *Lucas* suggests not.[35] Even

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[34] See notes 9 and 16, *supra*.

[35] In *Lucas*, the State of South Carolina claimed the right to prohibit use of certain property for its only economic beneficial purpose without payment of just compensation based upon a general legislative finding that such uses would constitute a nuisance. This Court rejected the idea

without that suggestion, however, the question does not raise serious analytical difficulties.

Plainly, no permit reservation can expand the scope of what is constitutionally permissible under *Nollan*, nor can the City create additional regulatory conditions after vested rights have accrued. So the permitting authority is bound by the more restrictive of the answers to the following questions: Was the imposition fairly contemplated within the permit reservation? And, if so, does the imposition meet the *Nollan* test?

In this case, the California Courts rejected the second question altogether. They then applied California's loose and forgiving interpretive approach to the former. They allowed general, legislative findings to supersede the specific fact-findings of the project approval process. We know from this record that when Levi's Plaza was approved, City viewed transit impact as an attribute of project *location* in the Northeast Waterfront of the City and not as an attribute of office use.[36] If City considered transit impact an

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that such a nuisance finding could properly be made by generally applicable legislative enactment. 60 U.S.L.W. at 4842.

[36] See note 13, *supra*. At trial, City's witnesses sought to explain away the references in this record to the Northeast Waterfront by testifying that enhanced bus service to the Northeast Waterfront benefits other areas of the City because the buses move from place to place, etc. RT 101:17-102:12; 134:4-10; 136:23-27. This testimony was advanced to show that references to the "Northeast Waterfront" should be construed to include the entire "Downtown Area" (redefined in the TIDFO to include virtually the entire eastern third of City) because the bus routes extend into those areas. The argument perfectly exemplifies Humpty Dumpty's rule: "When I use a word, it means just what I choose it to mean—neither more nor less." L. Carroll, *Through the Looking Glass and What Alice Found There*, Chapter 6. Because if the Northeast Waterfront (the "area of the City in which the project is located . . . " [Exhibit 2, paragraph 5(c)] is defined to include anywhere the buses go, the phrase means anything that the maker of the bus routes chooses to

attribute of office use, it would not have imposed a transit impact condition on a residential project in the Northeast Waterfront area in the very next action it took in which it imposed a transit condition on the approval of any project anywhere.[37]

Nor does the language of the permit condition calling for a "good faith effort to participate" contemplate a mandatory fee. That language calls for affirmative participatory action on the part of BJEW—as would be required to form an assessment district—the only funding mechanism under discussion at the time Levi's Plaza was approved.

The TIDFO does not deal specifically with the conditions of Levi's Plaza. It makes general findings that cumulative *office* development in a broadly defined Downtown Area impact transit and require payment of a $5 mandatory fee. No participation by property owners is required other than to write and deliver a check. The TIDFO redefines the impacted area, the nature of the impact and the funding mechanism as perceived at the time of Levi's Plaza.

City and the California Courts have shrugged all this off on the grounds that Levi's Plaza had an impact on transit and the approval resolution condition gave City the right to redefine that

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make it mean—in this case, two years after the fact in aid of City's quest for funds.

[37] The Wharf Park approval is also the law of the City. See note 4, *supra*. City's actions closest in time after Levi's approval provide highly probative evidence of its intent. See, *e.g., United States v. Stewart*, 311 U.S. 60, 64-65 (1940):

> . . . The later act can therefore be regarded as a legislative interpretation of the earlier act (citations) in the sense that it aids in ascertaining the meaning of the words as used in their contemporary setting. *It is therefore entitled to great weight in resolving any ambiguities and doubts.*

See also, *Atlantic Coast Line Railroad Co. v. Phillips*, 332 U.S. 168 (1947); *Erlenbaugh v. United States*, 409 U.S. 239 (1972).

impact in any terms that might fit within the broadest definition of "future funding mechanism . . . " At best, this is nothing more than the "indirect relationship" approach explicitly rejected in *Nollan*.[38] At worst, the northern boundary of the "Downtown Area" as defined by the TIDFO—with its sharp-edged bulge reaching more than four blocks to take in Levi's Plaza—punctuates, we submit, City's " ' . . . out-and-out plan of extortion.' (Citation)." *Nollan*, 483 U.S., at 837.

We agree that Condition 5(c) in the Levi's Plaza approval resolution deals with transit as does the TIDFO. More than that is required, however, for the TIDFO to apply to Levi's Plaza. As this Court observed, some sort of condition dealing with "visual access" might have been constitutionally permissible in Nollan. 483 U.S., at 835. The access condition selected by the Commission, however, was not—because it did not alleviate a burden caused by the Nollans' project.

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[38] In *Nollan*, the California Court of Appeal stated its conclusion as follows:

> In *Grupe v. California Coastal Com.*, (1985) 166 Cal.App.3d 148, 165, 212 Cal.Rptr. 578, the court construed the leading California case on the constitutionality of exactions, (citation) to hold that only ***an indirect relationship between*** an exaction and a need to which the project contributes need exist. We agree with the *Grupe* reasoning . . . .The Court in *Grupe* held that the access condition was related to a need for pubic access to which Grupe's project contributed, even though standing alone it had not created the need for access. . . . .

223 Cal.Rptr. 28, 30 (1986).

It is precisely this "indirect relationship" formula that this Court rejected. 483 U.S., at 838, 841. Despite that rejection, it is precisely the same indirect, general relationship that the Court of Appeal has used in this case.

Fifth Amendment "just compensation" cases are decided on their particular facts.[39] In no class of cases can that be more clear than those where permit conditions must directly mitigate impacts on the public interest that (i) a proposed project would otherwise cause and that (ii) would be sufficient to justify prohibiting development of the project in the first instance. We doubt that a fact specific requirement of this sort can be met by a generally applicable legislative enactment adopted two years after the fact. Such a conclusion is particularly compelling when the enactment purports to crystalize the pivotal issues of impact, mitigation and public interest that City admits it could not resolve when it was engaged in the very fact-finding exercise upon which the validity of the imposition in this case must depend.[40]

We submit that if the nature and extent of an imposition such as a regulatory fee is reserved for future determination, that determination must meet the same constitutional standards articulated in the *Nollan* case that would have been required at the time the permit was issued. It must be based on the same facts and the same public interest considerations. The City must be able to show that the condition substantially advances a legitimate interest that would have justified a regulation prohibiting development of the project in the first place. And the condition reserving that judgment to a future date must precisely spell out the public interest to be served, the impact to be alleviated and the type of mitigation that would achieve the purpose.

None of that happened here, nor did the California Courts require it. They rejected *Nollan* entirely and did not get past the

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[39] See authorities cited at note 28.

[40] Issuance of a permit for a project such as Levi's Plaza is an exercise in administrative adjudication to which the requirements of due process apply. See, *e.g., Horn v. County of Ventura*, 24 Cal.3d 605, 156 Cal. Rptr. 718, 596 P.2d 1134 (1979); *Ward v. County of Riverside*, 273 Cal.App.2d 353, 78 Cal. Rptr. 46 (1969).

general concept of "transit." In so doing, they vindicated City's demand for $3,100,000.

Nollan applies—and it requires more than City could or did show to sustain the TIDFO exaction against Levi's Plaza.

CONCLUSION

The California Court of Appeal erred when it rejected *Nollan* as precedent for resolution of this case. In holding that *Nollan* does not apply to a monetary imposition, the California Court of Appeal drastically and erroneously limited a landmark opinion of this Court.

This Court should issue a writ of certiorari to reverse the result below and hold that *Nollan* applies to monetary exactions imposed as conditions upon the issuance of permits; and that the imposition in this case fails the substantial advancement test *Nollan* articulates.

Dated: July 14, 1992

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(APPENDICES FOLLOW)

APPENDIX A

CERTIFIED FOR PUBLICATION
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

FILED JANUARY 31, 1992

BLUE JEANS EQUITIES WEST,
Plaintiff and Appellant,
v.
CITY AND COUNTY OF SAN FRANCISCO,
Defendant and Respondent.

A051759
(Super. Ct. No. 814330
San Francisco County)

WHITE, P.J. In this action we consider whether the heightened scrutiny test alluded to in *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825 (hereafter *Nollan*) should be applied to San Francisco's Transit Impact Development Fee (TIDF) Ordinance. (Ord. No. 224-81, codified at S.F. Admin. Code, § 38.1 et seq.) We conclude the *Nollan* analysis is applicable only to "possessory takings," rather than "regulatory takings," and does not apply to the TIDF.

FACTS AND PROCEDURAL BACKGROUND

Plaintiff Blue Jeans Equities West is the owner and developer of Levi's Plaza, a five-building office, retail and condominium complex in the north or northeast waterfront section of San Francisco. This area of San Francisco is located away from the financial district, the traditional area of downtown office space. At the time of the project's conception, the main tenant was to be Levi Strauss & Company, which was then located in the financial district of the city. Prior to construction of the complex, a final environmental impact report was prepared by the San Francisco

Department of City Planning. Among other things, the report discussed the adverse impact the project would have on transportation.[1]

The permit for Levi's Plaza was approved by the San Francisco Planning Commission's Resolution No. 8142 on January 4, 1979. The resolution contained a condition in its transit mitigation section, designated as paragraph 5(c), which provided: "The owner of the project shall make a good-faith effort to participate in future funding mechanisms to assure adequate transit service to the area of the city in which the project is located."

On May 5, 1981, the San Francisco Board of Supervisors enacted the TIDF ordinance. As our Supreme Court described it: "The ordinance, which became effective the following month, requires developers of downtown buildings containing new office space to pay a TIDF as a condition of issuance of a certificate of completion and occupancy. [Citation.] The TIDF, not to exceed $5 per square foot of new office space, provides revenue for the municipal railway to offset the anticipated costs of the increased peak-period ridership generated by the new office space over the useful life of each office building." [Citation.]" (*Russ Bldg. Partnership v. City and County of San Francisco* (1988) 44 Cal.3d 839, 844-845 (hereafter *Russ II*).) At the time of its enactment, plaintiff had not yet received a certificate of completion for Levi's Plaza.

Plaintiff filed a complaint for declaratory relief against the city, contending the TIDF ordinance is unlawful and invalid as applied to the Levi's Plaza project and the TIDF may not be imposed with respect to plaintiff. While the case was pending, the parties

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[1]The report states in pertinent part: "Employees arriving by BART, AC Transit, SAMTRANS, Southern Pacific, and the ferries would have to transfer to another mode (MUNI) to reach the project site. The proportion of vehicle drivers among Levi Strauss employees would tend to increase from about 16% to about 17.5%. Sixteen additional bus runs on Routes 15/42 and 32 would have to be operated during the peak hour to provide adequate capacity to sustain the 17.5% vehicle-driver modal split. This would represent about 4-minute headways on the combined 15 and 42 routes and about 6-minute headways on Route 32."

stipulated to the fee calculation and plaintiff deposited the agreed amount, over $3.1 million, in trust, pending the case's outcome.

The trial court entered judgment for defendant, finding that the TIDF ordinance is not an unconstitutional "taking" on its face or as applied to plaintiff, plaintiff acquired no vested right to build or use Levi's Plaza without payment of the TIDF, and defendant is not estopped from requiring plaintiff to pay the TIDF. This appeal followed.

DISCUSSION

In *Russ Bldg. Partnership v. City and County of San Francisco* (1987) 199 Cal.App.3d 1496 (hereafter *Russ I*), Division Five of this District held the San Francisco TIDF ordinance was a valid development fee, which could not be challenged under articles XIII A and XIII B of the California Constitution or the equal protection and due process clauses of the federal and state Constitutions. In eesence, the opinion finds the TIDF a fee, rather than a special tax. (*Id.*, at p. 1507.)

In *Russ II*, the Supreme Court addressed the question of whether the TIDF ordinance could be applied to projects which, at the time of the enactment of the ordinance, were in the course of construction pursuant to building permits conditioned on the developers' participation "in a downtown assessment district, or similar fair and appropriate mechanism, to provide funds for maintaining and augmenting transportation service . . . ." (*Russ II, supra,* 44 Cal.3d at p. 843.)[2] The high court concluded that the condition encompassed the TIDF, and held that the TIDF could be imposed on the projects without impairing the developers' vested rights. (*Ibid.*) However, the *Russ II* court expressly declined to address whether the TIDF violated the takings clause of the United States Constitution, as interpreted in *Nollan*. (*Russ II, supra,* 44 Cal.3d at p. 845, fn. 6.)

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[2]*Russ II* left intact the *Russ I* holding that the TIDF was a valid development fee. (*Russ II, supra,* 44 Cal.3d at p. 845.)

In *Nollan*, the United States Supreme Court held the California Coastal Commission had violated the Fifth Amendment by conditioning a building permit for beachfront property on the owners' dedication of an easement allowing the public to walk on the portion of the property nearest to the ocean. The condition requiring an easement violated the "taking" clause, because it did not serve a governmental purpose related to the permit to rebuild. (*Nollan, supra*, 483 U.S. at p. 838.) At least one California court has interpreted the *Nollan* holding as providing "there must be a substantial connection, or 'nexus' between the public burden created by the construction and the necessity for the easement." (*Surfside Colony, Ltd. v. California Coastal Com.* (1991) 226 Cal.App.3d 1260, 1267, fn. omitted). This interpretation is based, in part, on footnote 3 of the *Nollan* opinion: "[O]ur opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, [citation], not that 'the State *"could rationally have decided"* that the measure adopted might achieve the State's objective.' [Citations.]" (*Nollan, supra,* 483 U.S. at pp. 834-835, fn. 3.)

A threshold issue is whether the *Nollan* nexus test should be applied to the case at bench. Plaintiff takes an affirmative position, while defendant disagrees.

It is settled that any regulation of economic interests which "goes too far" becomes a "taking" under principles of inverse condemnation. (*Penna. Coal Co. v. Mahon* (1922) 260 U.S. 393, 415; *First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304, 316; *Golden Cheese Co. v. Voss* (1991) 230 Cal.App.3d 727, 731.) However, there is no set formula for determining what constitutes a "taking"; the courts rely instead on ad-hoc, factual inquiries into the circumstances of individual cases: (*Connolly v. Pension Benefit Guaranty Corp.* (1986) 475 U.S. 211, 224; *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 123-124.)

In *Agins v. Tiburon* (1980) 447 U.S. 255, the United States Supreme Court stated: "The application of a general zoning law

to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, [citation], or denies an owner economically viable use of his land, [citation]. The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest." (*Id.*, at p. 260). *Nollan* has been construed as refining the first prong of the *Agins* test "to require that the regulation advance the precise state interest which avowedly motivated it." (*Long Beach Equities, Inc. v. County of Ventura* (1991) 231 Cal.App.3d 1016, 1029.)

However, the high court appears to make a distinction between "regulatory taking," i.e., economic regulation, most forms of zoning, and other restrictions on land use, and "possessory takings," where the government, or an authorized third person, physically intrudes upon or appropriates the property. (See Manheim, *Tenant Eviction Protection and the Takings Clause*, 1989 Wis. L.Rev. 925, 939.)

Nollan specifically points out that "our cases describe the condition for abridgment of property rights through the police power as a '*substantial* advanc[ing]' of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective." (*Nollan, supra*, 483 U.S. at p. 841, emphasis in original.) Based on this language, most legal scholars have concluded the *Nollan* strict scrutiny approach is limited to unconstitutional conditions and possessory takings cases. (See, e.g., Manheim, *supra*, 1989 Wis. L.Rev. at p. 950; Lawrence, *Means, Motives, and Takings; The Nexus Test of Nollan v. California Coastal Commission* (1988) 12 Harv. Envtl. L.Rev. 231, 263; but see Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine* (1991) 91 Colum. L.Rev. 473.)

Case law subsequent to *Nollan* appears to confirm this view. *Pennel v. San Jose* (1988) 485 U.S. 1, concerns a city rent control ordinance that permits consideration of "hardship to a tenant"

when determining whether to approve a rent increase proposed by a landlord. In addressing whether rent control was *per se* a taking the court stated: "[W]e have 'consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulations entails.' " (*Id.*, at p. 12, fn. 6, quoting *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, 440.) *Pennell* appears to reaffirm the traditional view that as long as governmental regulations do not require a landowner to suffer the physical occupation of a portion of his real estate, the regulations will be analyzed as nonpossessory governmental activity. (See *Loretto, supra,* 458 U.S. at p. 440.)

More on point, in *Commercial Builders v. Sacramento* (9th Cir. 1991) 941 F.2d 872, commercial developers challenged a city ordinance that conditioned nonresidential building permits on payment of a fee to offset burdens associated with the influx of low-income workers to work on such developments. The developers argued that pursuant to *Nollan*, an ordinance that imposes an exaction on developers can be upheld only if it can be shown that the development is directly responsible for the social ill that the exaction is designed to alleviate. Citing *St. Bartholomew's Church v. City of New York* (2nd Cir. 1990) 914 F.2d 348, 357, fn. 6, *Adolph v. Federal Emergency Management Agency* (5th Cir. 1988) 854 F.2d 732, 737, and *Naegele Outdoor Advertising, Inc. v. City of Durham* (4th Cir. 1988) 844 F.2d 172, 178, the Ninth Circuit concluded *Nollan's* heightened scrutiny test was inapplicable to regulations that do not constitute a physical encroachment on land. (*Commercial Builder, supra,* 941 F.2d at p. 874.)

Plaintiff principally relies on *Bixel Associates v. City of Los Angeles* (1989) 216 Cal.App.3d 1208, to support its claim that a heightened scrutiny test should be employed. In *Bixel,* a developer was required to pay a fire hydrant fee as a condition of the issuance of a building permit. The fee was established by two city ordinances. The developer argued that the fee was a special tax, which violated article XIII of the California Constitution. The Court of Appeal agreed, holding that the fire hydrant fee ordinances did not contain language embodying the required constitu-

tional safeguards which must be employed in fashioning a valid development fee.[3] (*Id.*, at p. 1220.) *Bixel* neither considered nor decided whether the fee constituted a taking in violation of the Fifth Amendment. *(Ibid.)*

In light of the above-quoted language in *Nollan* and post-*Nollan* case law, we hold that any heightened scrutiny test contained in *Nollan* is limited to possessory rather than regulatory takings cases.

Plaintiff also contends condition 5(c) of its building permit did not contemplate payment of the TIDF. First, it submits the language of the condition, i.e., "the owner . . . shall make a good-faith effort to participate in future funding mechanisms to assure adequate transit service to the area of the city in which the project is located," denotes a voluntary rather than mandatory obligation.[4] We disagree. Good faith performance of a contract "emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1393, fn. 15, quoting Rest.2d Contracts (Tent. Draft Nos. 1-7) § 231, com. a.) Thus, the "good faith" language in condition 5(c) may not be employed to make plaintiff's participation discretionary.

Plaintiff next asserts the condition was devoted to improving transit service "to the area of the city in which the project is

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[3]The *Bixel* court explicitly distinguished the imprecise basis for determining the fee in that case with the methodology employed and described in *Russ I.* (*Bixel, supra,* 216 Cal.App.3d at p. 1219.)

[4]In its statement of decision, the trial court stated: "The Court further finds that the phrase 'good faith effort' was not included to allow mere voluntary participation in the support of transit funding mechanisms, but anticipates BJEW's participation in whatever funding mechanism the City and County could best devise that reasonably met the requirements of the transit demands. The phrase does not connote the mandatory language of 'shall,' however, such mandatory language was not necessary. The phrase was intended to acknowledge notice of an obligation to participate in whatever reasonable funding mechanism was devised."

located." It points out this condition was identical with the permit conditions for Wharf Park I and II, which are residential projects.[5] Plaintiff compares this language with the articulated purpose of the TIDF ordinance and the wording contained in the permits for projects considered in *Russ I*, and concludes the commitments were different. We find the argument unpersuasive.

The TIDF ordinance was enacted "[i]n order to be able to provide public transit services for new development in the Downtown Area, . . . [¶] It is the purpose of this ordinance to require developers of new development in the Downtown Area to pay a fee which is related directly to the incremental financial burden imposed upon the Municipal Railway both for initial capital outlay for the acquisition of rolling stock and the construction of facilities; and for the long term operation, maintenance and replacement of those facilities once they are in place." (S.F. Admin. Code § 38.3.) Each of the plaintiffs in *Russ I* and *Russ II* had, as a condition of its building permit, the following language: "In recognition of the need for expanded transportation services to meet peak demand generated by cumulative office development in the downtown area, [the developer] shall participate in a downtown assessment district, or similar fair and appropriate mechanism, to provide funds for maintaining and augmenting transportation service, should such a mechanism be established by the City." (*Russ II, supra,* 44 Cal.3d at p. 844.) While the wording of the condition contained in the *Russ* plaintiffs' permits differs from that in condition 5(c), our Supreme Court found the conditions substantially similar. (*Id.*, at p. 844, fn. 2.)

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[5]The Levi's Plaza approval provided that plaintiff "shall make a good-faith effort to develop . . . housing on a nearby site, for low- and moderate-income occupants." Plaintiff complied with this provision by building Wharf Park I and II, residential projects located between Levi's Plaza and Pier 39.

The fact that Levi's Plaza is located away from the traditional downtown area does not alter our view that the project is subject to the TIDF. Plaintiff stipulated that the project is within the geographic downtown area as defined by the ordinance. Plaintiff had notice that its development would adversely impact on public transportation and agreed to participate in funding mechanisms to assure adequate transit service to its project.

DISPOSITION

The judgment is affirmed.

White, P. J.

We concur:

Merrill, J.

Werdegar, J.

Blue Jeans Equities West v. City and County of San Francisco
A051759

Trial Court:	San Francisco County Superior Court
Trial Judge:	Daniel M. Hanlon
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APPENDIX B

First Appellate District, Division Three, NO. A051759
S025468

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

Blue Jeans Equities West,
Appellant
v.
City & County of San Francisco,
Respondent

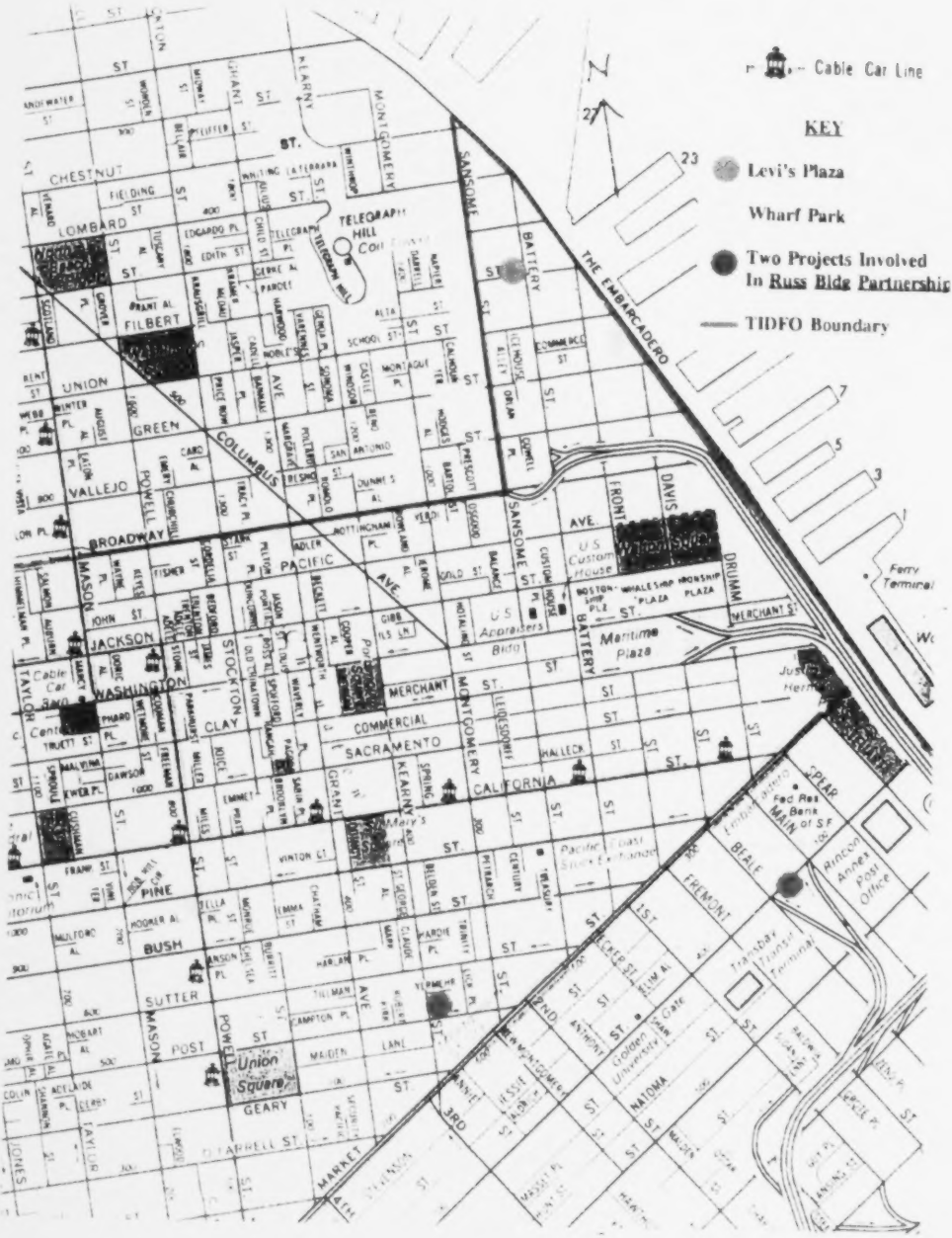
Supreme Court Filed
April 29, 1992
Robert Wandruff Clerk
Deputy

Appellant's petition for review DENIED.

The request for an order directing depublication of the opinion is denied.

Lucas
Chief Justice

APPENDIX C



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